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In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. — 805

CROWN ZELLERBACH CORPORATION, *Appellant*,

v.

STATE OF WASHINGTON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the appellee (State of Washington) respectfully moves that the above entitled appeal be dismissed for the reason that the appeal does not raise a substantial Federal question.

JOHN J. O'CONNELL,
Attorney General,

JOHN W. RILEY,
Assistant Attorney General,
State of Washington

STATE PRINTING PLANT, OLYMPIA, WASH.

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MOTION TO DISMISS

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BRIEF OF RESPONDENT IN SUPPORT OF MOTION TO DISMISS

I.

STATEMENT OF THE CASE

METHOD OF APPEAL

This case was initiated by the appellant in the Superior Court of the State of Washington in and

for Thurston County for the recovery of business and occupation taxes paid by the appellant for the period of January 1, 1952, to February 28, 1954.①

The trial court decided the matter adversely to the position of the appellant and, accordingly, findings of fact and conclusions of law and judgment dismissing the taxpayer's action were entered on May 6, 1957 (Tr. 12-18), pursuant to the memorandum decision of the trial court (Appendix B), Appellant's Statement as to Jurisdiction).

The taxpayer appealed to the Washington State Supreme Court, which court in turn decided the case adversely to the appellant, sustaining the trial court. (Appendix A, Appellant's Statement as to Jurisdiction.)

At each stage of proceedings in the lower courts and here, the appellant has asserted that the State of Washington is precluded from imposing the excise tax in question upon the privileged activity of manufacturing products within the State of Washington.

The only ground for support of this position is that the tax allegedly impinges upon interstate commerce.

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①Proceedings in the superior court followed earlier administrative proceedings before the Tax Commission of the State of Washington (Tr. 11 and 12).

STATUTES INVOLVED

The specific statutes which allegedly impinge upon interstate commerce provide in pertinent part as follows:[2] RCW 82.04.220:[3]

> "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."[4]

The statute imposes the tax

> "Upon every person * * * engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, * * * manufactured, multiplied by the rate of one-quarter of one percent.
>
> "The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state." RCW 82.04.240.[5]

RCW 82.04.450 defines "value of products" in part as:

> "The value of products, including byproducts, extracted or manufactured shall be de-

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[2] See Appendix D, Statement as to Jurisdiction, for full text.

[3] "RCW" abbr.: "Revised Code of Washington".

[4] [1955 c 389 § 42. Prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

[5] [1955 c 389 § 44. Prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

termined by the gross proceeds derived from the sale thereof * * * at wholesale * * * except: * * *

"(2) Where such products, including by-products, are shipped, transported or transferred out of the state, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale.

"In the above cases the value shall correspond as nearly as possible to the gross proceeds from sales in this state of similar products of like quality and character, and in similar quantities by other taxpayers, * * *"[6]

"Gross proceeds of sales" is defined as:

" 'Gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses." RCW 82.04.070.[7]

FACTS OF THE CASE

The appellant conducts very extensive business and manufacturing operations in the State of Washington. At Camas, Washington, it operates one of the largest pulp and paper products plants in the world. It also maintains other warehouses, offices,

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[6] [1949 c 228 § 3, last am'ds 1935 c 180 § 7; Rem. Supp. 1949 § 8370-7.]

[7] [1955 c 389 § 8. Prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

plants and vast timber holdings throughout the State of Washington. During the audit period in question the appellant's costs of doing business in Washington amounted to $63,751,944 as determined by its system of accounting. (Finding of Fact X, Tr. 12-17) Included in the cost of doing business in the State of Washington was the cost of goods manufactured in Washington and subsequently shipped outside the state for further processing by the appellant. *Not* included in the cost of doing business in Washington was the cost of goods manufactured or partially processed outside the State of Washington and subsequently shipped to the appellant's Washington plants for further processing or manufacturing which then became components of goods thereafter sold to its customers from its Washington plants (Finding of Fact X, Tr. 12-17).

During the audit period in question the appellant sold goods of a value of $60,021,192 to persons outside the State of Washington which were manufactured in Washington and shipped from Washington (Finding of Fact VIII, Tr. 12-17).

Appellant's remaining business in the State of Washington consisted of sale and delivery of goods manufactured by it within the State of Washington in the total value of $13,753,578, and an additional sum of $6,728,745 representing goods sold in Washington which had been manufactured out of the state. (Finding of Fact VIII, Tr. 12-17)

For the privilege of engaging in the business of manufacturing in the State of Washington, appellant was assessed a tax measured by the value of the products it manufactured during the audit period. The value of its gross manufactured product was determined by measuring "gross proceeds" of sale for the audit period in question less transportation costs of the goods which were delivered to out-of-state points. (Finding of Fact VI, Tr. 12-17) Appellant claims to be entitled to a refund of $150,731.69. Its claim is based upon a formula which it proposed (but which the trial court declined to adopt)[8] by which it claimed the gross proceeds of sale of Washington manufactured products must be reduced. The ratio or percentage purports to represent appellant's costs of doing business in Washington against its costs of doing business everywhere. By the appellant's formula the percentage by which it would reduce the value of its Washington manufactured products is 43.234% (see Finding of Fact VII, Tr. 12-17). However, the trial court did not determine factually whether such a ratio actually existed; and in its appeal to the Washington State Supreme Court appellant accepted the trial court's Findings of Fact.[9]

This court is now asked to find error in the Washington court proceedings and the Washington

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[8] (Finding of Fact, Tr. 12-17)

[9] The appeal to the Washington Supreme Court was directed solely to the Conclusions of Law and the Judgment entered by the trial court.

statutes because the Washington court refused to reduce by apportionment Crown Zellerbach's Business and Occupation[10] tax upon its Washington manufacturing activities.

QUESTION PRESENTED

Appellant has resorted to semantics to avoid the effect of the well established rule that *a state may impose an excise tax upon the local incident of engaging in the business of manufacturing; and that such a tax may be based upon any reasonable legislative measure for the determination of the tax.*[11] Appellant avoids the question of *incidence of the tax* by characterizing the tax as a tax "for the privilege of doing interstate business." (Statement as to Jurisdiction, p. 13)

The clear and unequivocal language of the statutes in question defines the incident of taxation in this case as the act and privilege of engaging in the business of manufacturing in the State of Washington. (RCW 82.04.220, *supra*)

As stated by the Washington Supreme Court in the decision from which appellant would now appeal, "It is the local activity of converting raw materials into a finished product (manufacturing) which is taxed. * * *" (Appendix A, Statement as to Jurisdiction, pp. 19-21)

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[10] (an excise tax)

[11] American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522.

Furthermore, the Washington court has well defined the term "manufacturing" as the term is used in the Washington statute.[12] Nevertheless, appellant demands apportionment.

The question thus presented, which has been decided by this court before[13] and which appellant would now have this court reconsider, may be stated as follows:

> DOES THE FEDERAL COMMERCE CLAUSE REQUIRE THE WASHINGTON LEGISLATURE TO APPORTION THE MEASUREMENT OF A FRANCHISE TAX ON APPELLANT'S WASHINGTON MANUFACTURING ACTIVITIES?

II.
ARGUMENT
THIS TAX IS IMPOSED UPON A PURELY LOCAL INCIDENT

A state imposed tax which may incidentally impinge itself upon products which flow in inter-

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[12] "Since the statute (RCW 82.04.120) does not define 'To manufacture' to include executive functions, the word 'manufacture' must be given its plain and ordinary meaning. *Pacific Northwest Alloys v. State*, 49 Wn. (2d) 702, 306 P. (2d) 197 (1957); *Miller v. Pasco*, 50 Wn. (2d) 229, 310 P. (2d) 863 (1957).

"To 'manufacture' is defined in Webster's New International Dictionary (2d ed.) as follows:

'To make (wares or other products) by hand, by machinery, or by other agency; * * *

'To work, as raw or partly wrought materials, into suitable forms for use; * * *

'To fabricate; to invent; also, to produce mechanically.'

"It is the local activity of converting raw materials into a finished product (manufacturing) which is taxed. RCW 82.04.070, *supra*, excludes any deduction from the gross proceeds of sales for the cost of property sold, the cost of materials used, labor costs, and so forth.

"We conclude that the tax imposed on 'manufacturing' does not merit an apportionment merely because a portion of the executive function of directing the manufacturing activity is carried on from outside this state."

[13] *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522.

state commerce is nevertheless valid and not *ipso facto* incompatible to the Federal Commerce Clause. *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. ed. 565; *Williams v. Stockham Valves, Northwestern Company v. Minnesota*, No. 33, October Term, 1958 (CCH Bulletin 577).

The touchstone of such cases has been firmly fixed by this court in commerce clause cases to be the *point of incidence of the tax. Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 66 L. ed. 622, 42 S. Ct. 305;[19] *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct. 508; *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913; *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546.

This court rejected early attempts by the Washington Legislature to impose a tax upon gross in-

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[19] "While a state may not use its taxing power to regulate or burden interstate commerce * * * on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained *where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund* (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. [Citing cases.] The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect, it." (Emphasis supplied.)

come, unapportioned, derived from activities characterized by this court as *interstate commerce*. *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608 (1936); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 82 L. ed. 68, 58 S. Ct. 72 (1937); *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. ed. 272, 59 S. Ct. 325.

Since that time the Washington Business and Occupation tax has been challenged several times. Repeated appeals to this court have been uniformly rejected and the Washington State taxes involved which were imposed upon purely local activities have been uniformly sustained. *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325 (1951), cert. denied, 342 U. S. 876; *Field Enterprises v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010 (1955), affirmed per curiam, 352 U. S. 806; *United States Steel Corporation v. State*, 51 Wn. (2d) 224, 316 P. (2d) 1099 (1957), dismissed for want of substantial federal question, 358 U. S. 46.

In the *United States Steel* case, *supra*, the appellant demanded that the Washington excise tax on wholesaling in Washington be apportioned by a percentage ratio determined in the same manner as here. The Washington Supreme Court refused to do so, saying:

> "Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's

> local wholesale and retail activities. No part of the tax is attributable to its manufacturing or other out-of-state activities. The sales are negotiated within the state of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction. *Norton Co. v. Department of Rev.*, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377; *Field Enterprises v. State, supra.*" *United States Steel Corporation v. State, supra*, page 226.

This court has held that a tax imposed upon the privilege of manufacturing can be measured without apportionment by the proceeds of sale regardless of the place of sale. The most persuasive case for this proposition is *American Mfg. Co. v. St. Louis*, 250 U. S. 459, *supra*. In that case the City of St. Louis imposed a tax virtually identical to that involved here for the privilege of carrying on the business of manufacturing. The tax was measured by:

> "* * * sales of goods manufactured by plaintiff in the city, afterwards removed to storage warehouses outside of the state, and later sold from these warehouses to purchasers in states other than Missouri, * * *." 63 L. ed. 1086.

In sustaining the tax, the court stated at 63 L. ed. 1087:

> "* * * No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. *The tax is computed according to the amount of the sales of*

such manufactured goods, irrespective of whether they be sold within or without the state, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the city of St. Louis. (Emphasis supplied.)

"There is no doubt of the power of the state, or of the city, acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with Federal right be shown, the states are free to lay privilege and occupation taxes. * * *

"*The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not*, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market. * * *" (Emphasis supplied.)

And it was concluded that:

"In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation

of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the state of Missouri, and hence does not deprive plaintiff in error of its property without due process of law." 63 L. ed. 1088.

The foregoing case has been repeatedly cited and quoted with approval in subsequent decisions. *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, *supra*; *Freeman v. Hewit*, 329 U. S. 249, 91 L. ed. 265, 67 S. Ct. 274.

In *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913, alluded to by the appellant, this court demonstrated the necessity of isolating with precision the point of incidence of a local tax *before determining* whether it is repugnant to the commerce clause. After distinguishing the Indiana tax from the *American Manufacturing Company* case in St. Louis, which was characterized as a tax upon gross receipts from commerce, the court concluded:

> "So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold, *it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured*, or by other permissible forms of levy upon the intrastate transaction. * * *" (Emphasis supplied.)

See also *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, *supra*; *Treasury of Indiana v. Wood Preserving Corp.*, 313 U. S. 62, 85 L. ed. 1188.

THE MEASURE OF THE WASHINGTON TAX IN QUESTION DOES NOT BURDEN INTERSTATE COMMERCE

We think that the authorities cited immediately above support the proposition that a tax imposed upon a purely local function is not changed in character or nature by the fact that the goods subsequently enter interstate commerce.

This court has not only held that apportionment is not required in such cases but has held further that interstate commerce must bear its fair share of local government even if the tax imposed by the state does have an incidental effect upon interstate commerce. *Williams v. Stockham Valve, supra*; "* * * It is axiomatic that the founders did not intend to immunize * * * commerce from carrying its fair share of the cost of the state government. * * *" (CCH 1959 Bulletin, p. 587.)

This principle has been recognized as settled by Professor Hartman in his book, STATE TAXATION OF INTERSTATE COMMERCE (Dennis & Company, 1953 at page 113):

> "Normally, if the tax is laid upon a subject within the taxing power of the State, it will not be condemned because of the measure as such. The 'validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount.' Thus

spoke the Court in *Home Insurance Co. v. New York*. And as if to emphasize the point, the Court went on to declare that no 'constitutional objection lies in the way of a legislative body prescribing any mode or measurement to determine the amount it will charge for the privilege it bestows.' The method of measuring the tax is said not to be open to attack even though the measure is found in property or in receipts from property not in themselves taxable. * * *"

Contrary to the appellant's assertion that the Washington court has ignored the ground rules observed by this court in *Williams v. Stockham Valves, Northwestern Company v. Minnesota*, Nos. 12 and 33, October Term, 1958 (CCH Bulletin 577), it is apparent from the language of this Court in those cases that the tax in this case is not obnoxious to the interstate commerce clause. This Court observed in the *Stockham* case that

"* * * While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. The levies are not privilege taxes based on the right to carry on business in the taxing State. The States are left to collect only through ordinary means. The tax, therefore, is 'not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce.' *Underwood Typewriter Co. v. Chamberlain, supra*, at 119. As was said in *Wisconsin v. Minnesota Mining & Mfg. Co.*, 311 U. S. 452 (1940), 'it is too late in the day to find of-

> fense to that [commerce] Clause because a state tax is imposed on corporate net income of an interstate enterprise *which is attributable to earnings* within the taxing state. * * *' *Id.*, at 453." (Emphasis supplied.)

See also *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, *supra.*

MANUFACTURING IS A PURELY LOCAL INCIDENT

This court has also held in a number of cases that commerce does not begin until manufacture is finished. "Commerce succeeds to manufacture and is not a part of it." The Commerce Clause of the Federal Constitution, accordingly, permits a state to exercise exclusive control over manufacturing. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526; *Hope Natural Gas Co. v. Hall*, 274 U. S. 284, 71 L. ed. 1049, 47 S. Ct. 639; *American Mfg. Co. v. St. Louis*, *supra.*

WASHINGTON'S TAX CANNOT BE DUPLICATED ELSEWHERE

Appellant ignores the multiple burdens test widely recognized as the method of determining the validity and fairness of a state imposed excise tax, *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, *supra.*

In that case Wyoming imposed a tax, quite similar to that in the case at bar, upon the business of

printing (magazines) within the State of Wyoming, the measure of the tax being identical to that of the case at hand. This court sustained the tax with the following enunciation of principle:

> "As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. *Cf. Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, *ante*, 68, 58 S. Ct. 72. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548, *supra*; *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 78 L. ed. 622, 54 S. Ct. 267, or by its value. *Oliver Iron Min. Co. v. Lord*, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526; *Hope Natural Gas Co. v. Hall*, 274 U. S. 284, 71 L. ed. 1049, 47 S. Ct. 639. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. * * *" 303 U. S. 250, 258.
>
> "* * * All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers

which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent." 303 U. S. 260.

No Substantial Federal Question

Appellant's description of the alleged substantial question in this case is that

> "the state court erred on the constitutional issue. * * * the decision is premised upon an irrelevant circumstance, *viz.*, that the *incident* sought to be taxed was purely local manufacturing. * * *" (Emphasis supplied, statement as to jurisdiction, p. 11)

But the incidence of such a tax *is* all important.[18] If a state may tax a local incident and prescribe reasonable conditions precedent *to the exercise of* a privilege, and if such a tax is imposed upon such a privilege and incident within the state, the commerce clause could not prescribe the measure of such a privilege tax. To conclude in the affirmative would amount to denial of the existence of that right.

Appellant's statement and description of why this case presents a substantial question is so indefinite as to raise a question of compliance with Rule 16.[19]

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[18] In *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913, which appellant claims as its principal authority, this court was careful to note the vital distinction between a tax on gross receipts and a tax upon a purely local incident, citing *American Mfg. Co. v. St. Louis, supra*, as a proper, constitutional example of the latter. We contend the *American Manufacturing* case is dispositive of the case at bar.

[19] Rule of Procedure of the United States Supreme Court.

We believe that every case upon which they rely is readily distinguishable.[17] For the most part, each of appellant's claimed authorities involve gross or net income taxes. Appellant has failed to cite a single authority supporting its claim for apportionment of a privilege tax applicable only to a point of incidence which is entirely local.

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[17] *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct. 508. Petitioner was engaged solely in interstate commerce. The state court held that incidence of the tax to be on the franchise of petitioner to do interstate business. Because the business was exclusively interstate no apportionment could make it valid.

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 314, 82 L. ed. 1365, 58 S. Ct. 913. This case involved an Indiana corporation and an Indiana tax. Eighty per cent of the business transacted was interstate. The tax was on the gross receipts from such interstate commerce. This court held it bad, because without apportionment it burdens interstate commerce because as a tax on sales it could be exacted in the fullest extent by the state in which the sales are made as well as by the state of manufacture. The court distinguished a tax upon the privilege of manufacturing *measured* by the volume of production or the amount of sales. This court indicated that out-of-state sales may be used as a measure of a tax on manufacturing. But out-of-state sales can not be used as a measure of a sales or gross income tax.

Joseph v. Carter & Weekes S. Co., 330 U. S. 422, 427, 91 L. ed. 993. Tax imposed on business of stevedoring based on receipts. Taxpayer takes property from the pier or from a vessel and stores it or loads it in or alongside another vessel for transportation in interstate commerce.

All this is done within New York City. The court said this is not a tax apportioned to income derived from activities within the taxing state, because stevedoring is a necessary continuation of transportation. The difference between this case and *Crown Zellerbach* is in the following quote:

> "* * * The selection of an intrastate incident as the taxable event actually carries a similar threat [multiple burden] to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. * * *"

There can be no multiple burden in *Crown Zellerbach*. The taxable event is distinct from the commerce. The taxable incidence of manufacturing takes place only in the State of Washington.

Michigan-Wisconsin L. Co. v. Calvert, 347 U. S. 157, 98 L. ed.

III.

CONCLUSION

By making "Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances * * *",[13] the appellant

583. Tax on "gathering gas" based on number of cubic feet gathered. The taxpayer bought gas direct from a pipeline from a plant in Texas. It piped the gas immediately out of the state for sale. None was sold in Texas. The gas was piped from the plant directly into the taxpayer's pipeline and in a steady, continuous flow it was taken out of the state. This taking of the gas was not subject to repetition elsewhere. The question was whether the activity of taking is an integral part of the interstate business. The court held that as the gas is in continuous flow from the manufacturer's tanks to out of the state it is a tax in reality on its exit from the state. It is a tax after production and the taking by the taxpayer from the plant which is the taxable incidence cannot be separated from the interstate transportation.

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 80 L. Ed 956, 56 S. Ct. 608. The tax there was a privilege tax placed upon the occupation of broadcasting and the court held this in itself was interstate communication and the tax was measured by the gross receipts derived from interstate commerce. If broadcasting could be taxed, so also could reception which would place an accumulative tax burden on interstate communication, the incidence of the tax.

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, 82 L. ed. 68, 58 S. Ct. 72. This case is the same as *Joseph v. Carter & Weekes S. Co., supra*, and involves a tax on gross receipts on the movement of cargo on and off of a ship. The court held the movement of such cargo substantially a continuation of the transportation and, therefore, inseparable from interstate commerce.

Gwin, White & Prince v. Henneford, 305 U. S. 434, 83 L. ed. 272, 59 S. Ct. 325. This was again a tax on gross income which was unapportioned to interstate activities. The interstate commerce service which the taxpayer renders and for which the tax compensation is paid is not wholly performed within the state. The tax reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume. Here again a tax on the gross receipts from an interstate business was held bad. The entire service for which the gross proceeds are paid in this case is in aid of the shipment and sale of merchandise in interstate commerce. In the *Crown/Zellerbach* case the manufacturer's tax is strictly local and has nothing to do with interstate commerce.

[13] *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 85 L. ed. 267.

completely ignores the doctrine established in *American Mfg. Co. v. St. Louis, supra,* subsequently approved many times.

It is submitted that the *American Mfg. Co.* case, *supra,* is directly in point with the case at bar. The nature of the tax imposed in this case, its consequences and its relationship to the doctrine of interstate commerce can be stated no more clearly than there.[19]

To decree apportionment of a state tax upon a purely local incident because a taxpayer's other activities (in this case executive and sales activities) cross state lines is unnecessary and illogical. Apportionment is not in question here; appellant's activities are purely local.[20]

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[19] The following language by Justice Pitney:

"* * * The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the state, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the city of St. Louis.

"* * *

"The *city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not,* * * *.

"* * *

"In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the *same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government.* Therefore, it does not amount to a regulation of interstate commerce. * * *" (Emphasis supplied.)

[20] *United States Steel Corporation v. State,* 51 Wn. (2d) 224, 316 P. (2d) 1099.

Even assuming satisfactory proof of the appellant's "extra-state" cost of manufacturing,[21] to decree apportionment here amounts to a re-definition of the statutory measurement of tax to be imposed upon the local "incident."

This case should be dismissed for want of a substantial federal question accordingly.

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[21] The trial court made no such finding, and under Rule 43, Rules on Appeal (Second Supplemental Transcript, p. 1), no alleged error of the superior court will be considered by the supreme court unless the same be definitely pointed out in the "Assignments of Error" in appellant's brief. Reference is made to the Assignments of Error contained in the appellant's brief in the Supreme Court of the State of Washington, at page 5 (Second Supplemental Transcript, p. 1), wherein the appellant's Assignments of Error were limited to the entry of judgment and Conclusions of Law.